

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Midamerican Energy Company	)	
Nicor Energy, L.L.C.,	)	
AES New Energy, Inc., and the	)	
National Energy Marketing Association	)	
	)	Docket No. 02-0290
Request for Expedited Rulemaking Regarding	)	
Telephonic and Internet Enrollment Procedures	)	
Consistent with § 2EE of the Consumer Fraud	)	
and Deceptive Practices Act	)	

**NOTICE OF FILING**

**PLEASE TAKE NOTICE** that on this date, June 19, 2002, we filed with the Chief Clerk of Illinois Commerce Commission the enclosed People of the State of Illinois' Brief in Support of in Part and in Opposition to in Part the Staff of the Illinois Commerce Commission's Motion to Dismiss to the Chief Clerk of the Illinois Commerce Commission at 527 East Capitol Avenue, Springfield, Illinois 62794-9280.

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Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, Mark G. Kaminski, Assistant Attorney General, hereby certify that I served the above identified documents upon all active parties of record on the attached service list on June 19, 2002, by electronic mail to all active parties. Hard copies will be provided upon request.

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MIDAMERICAN ENERGY COMPANY,	)	
NICOR ENERGY, L.L.C.,	)	
AES NEW ENERGY, INC., AND THE	)	
NATIONAL ENERGY MARKETERS	)	
ASSOCIATION	)	ICC Docket No. 02-0290
	)	
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Deceptive Business Practices Act.	)	

**PEOPLE OF THE STATE OF ILLINOIS' BRIEF IN SUPPORT OF IN PART  
AND IN OPPOSITION TO IN PART THE STAFF OF THE  
ILLINOIS COMMERCE COMMISSION'S MOTION TO DISMISS**

Pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), the People of the State of Illinois, by and through James E. Ryan, Attorney General ("the People"), respectfully request that this Commission grant in part and deny in part the Commission Staff's ("Staff") Motion to Dismiss the Petition Requesting the Expedited Promulgation of a Rule by MidAmerican Energy Company, Nicor Energy, L.L.C., AES New Energy, Inc., and the National Energy Marketers Association (collectively "Petitioners") commensurate with the arguments below. The People both respond to portions of the Commission Staff's Motion to Dismiss and Reply to Peoples Energy Services Corporation's Response to Staff's Motion ("PE Response") and the Petitioners' Response and Request for Denial of the Motion to Dismiss ("Petitioners' Response").

## **I. Introduction and Summary**

On April 30, 2002, the above parties filed a petition for an expedited rulemaking (“Petition”), offering separate proposed rules for enrolling retail electric customers via both the internet and telephone solicitation. The internet enrollment would use a website enrollment platform, wherein a customer would authorize a change in their electricity supplier using an electronic signature. Petition at 12. The telephonic solicitation and enrollment would be accomplished by the use of a Third Party Verification (“TPV”) procedure, which would use “an electronically recorded oral authorization to switch electric providers.” Petition at 9. Both of these proposed rules were based on Section 16-115A of the Public Utilities Act (“the Act”), which states “An alternative retail electric supplier shall obtain verifiable authorization from a customer, in a form or manner approved by the Commission consistent with Section 2EE of the Consumer Fraud and Deceptive Practices Act, before the customer is switched to another supplier.” 220 ILCS 5/16-115A(b). Under Section 2EE, an electric service provider must obtain “the necessary written authorization from a subscriber for a change in electric service by using a letter of authority.” 815 ILCS 505/2EE(1).

On May 21, 2002, the Staff filed a Motion to Dismiss the Petition, arguing that the proposed telephone enrollment rules are not authorized by Illinois law and the internet rules would already be addressed by workshops in other dockets. Specifically, the Staff argued that the TPV enrollment process was not an electronic signature pursuant to Section 5-115 of the Illinois Electronic Commerce and Security Act (“ECSA”), 5 ILCS 175/1 *et seq.*, which excepted “a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law” from the Act’s effect. Motion at 2,

quoting 5 ILCS 175/5-115(b)(1). The Staff further argued that the case law cited in the Petition did not support or even address the issue of TPV as a substitute for a signature. Finally, the Staff argued that “Petitioners confuse matters further by incorrectly citing Commission approvals of telephonic enrollment ‘in the gas choice pilot programs of Nicor Gas, Peoples Gas and North Shore Gas’ (citations omitted) as precedents favoring the [TPV] enrollment alternative for electric service providers and suppliers.” Motion at 5-6. The People support this portion of the Motion to Dismiss.

The Staff also argued that a rulemaking would interfere with the Commission-mandated workshops regarding internet enrollment. Motion at 6. Further the Staff argued that a tariff-based resolution of the internet enrollment issue was the favored alternative, because the Commission’s recent DST orders only provide for workshops. Motion at 7. The People oppose this portion of the Motion to Dismiss.

On June 12, 2002, Peoples Energy Services Corporation (“PE Services”) filed a response to Staff’s Motion to Dismiss. PE Services countered Staff’s arguments against the proposed TPV enrollment rules, arguing that Section 2EE of the Consumer Fraud and Deceptive Practices Act (“Consumer Fraud Act”), 815 ILCS 505/1 *et seq.* 815 ILCS 505/2EE, ECSA and the federal Electronic Signatures in Global and National Commerce Act of 2000 (“E-Sign”)<sup>1</sup>, 15 U.S.C. 7001, *et seq.*, when read together allow the TPV method of enrollment. The People reply in opposition to this argument. PE Services also argued against solely using the tariff-based

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<sup>1</sup>Page 2 of PE Services’ Response labels the Illinois Electronic Commerce and Security Act as “E-Sign” and the federal Electronic Signatures in Global and National Commerce Act of 2000 as “ECSA.” However, the Response’s argument correctly refers to ECSA as the Illinois statute.

alternative to the proposed internet enrollment rules.

Finally, on June 13, 2002, the Petitioners filed a response to the Staff's Motion to Dismiss. The Petitioners offered no legal argument other than to refer to the natural gas enrollment methods already approved in previous Commission dockets in support of an argument that the Commission has already established a policy of allowing TPV verification. Petitioners' Response at 4. These arguments do not differ much from the original Petition arguments opposed by the Staff's Motion to Dismiss. As stated above, the People support the Staff's arguments against the proposed TPV enrollment rules.

## **II     Argument**

### **A.     Telephonic Enrollment**

The Petition proposes rules to regulate telephonic enrollment of electricity customers to change electricity suppliers. However, the law cited in the Petition does not authorize the use of TPV to verify changes in electricity suppliers. Motion at 1-2. Nor does Illinois law provide for rules regarding telephonic enrollment of electricity customers. Indeed, the TPV process, for which the petitioners are seeking a rulemaking, cannot fulfill the requirements of a Section 2EE Letter of Authority ("LOA") under federal or Illinois law.

#### **1.     The Staff's Motion to Dismiss the Rulemaking Regarding TPV should be granted.**

The Petition's request that the Commission promulgate TPV enrollment rules is not based on any legal authority. The Commission is a creation of statute, having only those powers given to it

by the General Assembly. *See City of Chicago v. Illinois Commerce Comm’n*, 79 Ill.2d 213, 402 N.E.2d 595, 597-598 (1980). The General Assembly has not authorized the Commission to promulgate rules for telephonically switching electricity suppliers. Therefore, the Commission cannot promulgate rules regarding telephonic enrollment of retail electric customers.

The Commission must determine whether a petition’s claims are sufficient to set forth a cause of action upon which relief may be granted. *See Hoffman v. Allstate Insurance Co.*, 85 Ill. App. 3d 631, 633, 407 N.E.2d 156, 158 (2<sup>nd</sup> Dist. 1980). Mere allegations of legal conclusion are insufficient and need not be accepted by the Commission. *See id.*, citing *Morse v. Nelson*, 48 Ill. App. 3d 895, 363 N.E.2d 167 (5<sup>th</sup> Dist. 1977). The Petition only offers a naked legal conclusion that its TPV enrollment process is authorized by the law, which is insufficient to avoid dismissal. While the Petition appears to make no legal distinction between the legal authority to promulgate internet enrollment rules and TPV enrollment rules, the authority cited in the Petition only supports internet enrollment. *See* Section I.A.2.b.

## **2. The Petition cannot support its request for a telephonic rulemaking.**

The Petition for Rulemaking offers the following support for a rulemaking regarding third party oral verification procedures:

1. The telephonic and internet rules will lower customer acquisition costs. *See* Petition at 2, *see also* Petitioner’s Response at 3-4;
2. “The Commission has been vested with the authority by the Choice Act to approve the form and manner of the verifiable authorization from the customer, provided that form and manner is consistent with § 2EE of the Fraud Act [220 ILCS 5/16-

115A, (effective Dec. 16, 1997)].” Petition at 2-3;

3. The Commission approved both telephonic and internet enrollment methods in the gas choice pilot programs of Nicor Gas, Peoples Gas and North Shore Gas. *See* Petition at 3, *see also* Petitioner’s Response at 4.

The first of these arguments is a policy argument regarding the potential benefits to the competitive market that is only reached after the ICC’s statutory authority is determined. This policy argument is irrelevant to whether the ICC has been authorized to promulgate rules regarding TPV for electricity customers. The third argument refers to the verification of natural gas industry enrollment procedures, which do not have a statutory signature requirement. Having not been specifically limited by the General Assembly, as Electric customer changes have in the Consumer Fraud Act, the natural gas cases are not helpful in determining this issue. 815 ILCS 505/2EE

The second argument paraphrases the Public Utilities Act, and is therefore relevant to the statutory question. *See* 220 ILCS 5/16-115A(b). However, the Petition fails to address how Section 2EE’s requirement, which states that the electric service provider must obtain the “necessary written authorization from a subscriber for a change in electric service by using a letter of authority,” can be met by a telephonic recording. 815 ILCS 505/2EE(1) (emphasis added). The Petition correctly cites support for a rulemaking regarding internet enrollment. However, the authority offered by the Petition stops well short of proving that TPV enrollment for electricity customers is supported by law.

**a. Section 2EE requires a physically written signature.**

The Public Utilities Act (“PUA”) requires that “[a]n alternative retail electric supplier shall obtain verifiable authorization from a customer, in a form or manner approved by the Commission consistent with Section 2EE of the Consumer Fraud... Act, before the customer is switched from another supplier.” 220 ILCS 5/16-115A(b). In order to switch a customer’s electric supplier, Section 2EE of the Consumer Fraud Act requires that an Alternative Retail Electric Supplier (“ARES”) obtain a Letter of Authority (“LOA”), signed and dated by the customer, that legibly sets out a minimum amount of information regarding the switch, and explicitly states that by signing and dating the LOA, the customer is agreeing to the switch. 815 ILCS 505/2EE.

**b. An electronic signature may satisfy the Section 2EE signature requirement.**

Both the Illinois Electronic Commerce and Security Act (“ECSA”), 5 ILCS 175/1 *et seq.*, and the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”), 15 USCS § 7001 *et seq.*, provide that an electronic signature may satisfy a statutory requirement that a document be signed or in writing. Therefore, an LOA’s physical or “wet” signature requirement may be met by an electronic signature. While ECSA does not support an electronic signature where it results in “a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law,” no party to this docket has generally claimed that an electronic signature runs afoul of this provision. However, the Staff’s Motion to Dismiss claims that the proposed TPV rules are clearly inconsistent with the manifest intent of the law making body. Motion at 2. Section I.A.2.d.



below will address both the Staff's arguments and reply to the legal arguments made in response to the Staff's Motion to Dismiss.

**c. The TPV process does not produce an electronic signature.**

PE Services Response to the Staff's Motion to Dismiss argues that the Consumer Fraud Act, ECSA and the federal E-Sign Act read together allow for TPV enrollment of electricity customers, reiterating the arguments originally stated by the Petition. PE Response at 4. The Petition attempts to show that an oral recording of the customer's asset is an electronic signature in the context of the federal E-Sign Act. Petition at 5. The Petition also attempts to find legal authority for using TPV as a verification procedure by shoe-horning an oral recording into the ECSA definition of an electronic signature. Petition at 7. Neither of these Acts support the Petition's interpretations.<sup>2</sup>

**i. The E-sign Act explicitly excludes oral recordings as an electronic signature**

The Petition and PE Response wrongly rely on the federal Electronic Signatures in Global and National Commerce Act ("E-Sign") as supporting a rulemaking for TPV enrollment. 15 USCS § 7001 *et seq.* The Petition specifically relies on the language of Section 7001(c)(2)(B) of the E-sign Act to support the TPV enrollment, reasoning that an oral recording would be sufficient to verify or acknowledge receipt of the information required to be in the LOA. Petition at 5. However, this position betrays a shallow analysis of both the E-sign Act and ECSA. The

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<sup>2</sup>The after-the-fact transcription of a previous recording described in the Petition is not a "written" signature. Petition at 11.

Petition cites both the ECSA and the federal E-Sign Act. Petition at 3-7, *citing* 5 ILCS 175/1 *et seq.*; 15 USCS § 7001 *et seq.* Both Acts provide that documents that must be signed may not be invalidated because their signatures are electronic. *See* 15 USCS § 7001(a)(1); 5 ILCS 175/5-120(a). However, when addressing TPVs, these Acts may diverge, and the issue of which one controls in Illinois becomes significant.

First, E-Sign's definition of an electronic record does not include oral communications.

Section 7001(c)(6) states:

Oral communications. An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

15 USCS § 7001(c)(6)(emphasis added). The only Illinois laws that specifically address the methods for enrollment of electricity customers are the Public Utilities Act and Section 2EE of the Consumer Fraud Act.<sup>3</sup> Neither of these laws provide for a recording of an oral communication, digital or otherwise, to qualify as a signature. Therefore, the Petition's proposed TPV method of customer enrollment is specifically rejected by the federal E-Sign Act. If E-Sign is determined to be the controlling law, then the Petition must be dismissed.

ECSA, on the other hand, does not have a similar provision rejecting oral communications. Rather, ECSA provides that:

An electronic signature may be proved in any manner, including by showing that a procedure existed by which a party must of necessity have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of such party in order to proceed further with a transaction.

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<sup>3</sup>ECSA is not applicable law until it is determined to supercede E-Sign. Regardless of whether ECSA or E-sign is controlling law in Illinois, an oral recording will not qualify as an electronic signature under applicable law. *See* Section II.A.2.d.ii.

5 ILCS 175/5-120(b). How this provision applies to the Petition will be addressed below. Given that E-Sign clearly does not support the Petition, the threshold issue is whether E-Sign is the controlling law.

**ii. The E-Sign Act is the controlling law in Illinois**

A federal law preempts state law, where it is the United States Congress' intent to occupy that field of law. *See United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill.2d 1, 39, 642 N.E.2d 719, 731 (1994), *citing General Motors Corp. v. Illinois Commerce Comm'n*, 143 Ill.2d 407, 416, 574 N.E.2d 650 (1991). Both E-Sign and ECSA address how and when electronic signature will be valid. Under normal circumstances, E-Sign would preempt state electronic signature laws. However, E-Sign provides an interesting twist to the question of preemption.

Section 7002 of E-Sign states in part:

(a) In general. A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 [15 USCS §§ 7001] with respect to State law only if such statute, regulation, or rule of law--

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or title II [15 USCS §§§§ 7001 et seq. or 15 USCS §§ 7021], or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2) (A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if--

(i) such alternative procedures or requirements are consistent with this title and title II [15 USCS §§§§ 7001 et seq. and 15 USCS §§ 7021]; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology

or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures;

15 USCS § 7002 (emphasis added). The language of subsection (a) clearly evidences Congress' intent to occupy the field of electronic signature law. Section 7002 both establishes that E-Sign is the controlling law, and relinquishes that control in specifically enumerated instances. Therefore, in order to be the controlling law in Illinois, ECSA must meet one of these enumerated exceptions.

ECSA is not an enactment or adoption of the Uniform Electronic Transactions Act. So, ECSA must meet the requirements of subsection (2)(A). First among the requirements that ECSA must meet is to specify “alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish legal effect, validity, or enforceability of contracts or other records...” 15 USCS § 7002(2)(A). Further, these alternative procedures or requirements must be consistent with 15 USCS §§ 7001 *et seq.* and 15 USCS § 7021. 15 USCS § 7002(2)(A)(i).

As stated above Section 7001(c)(6) disqualifies recordings of oral communications as electronic records. 15 USCS § 7001(c)(6). A State electronic signature statute must be consistent with Section 7001, including subsection (c)(6), of E-Sign, in order to supercede E-Sign. *See* 15 USCS § 7002(2)(A)(i). Where the State electronic signature statute is inconsistent with Section 7001 of E-Sign, the State statute is preempted by E-Sign.

Therefore, the question of whether TPV enrollments qualify as electronic signatures or records under ECSA is moot. If, as argued by the Petitioners, TPV enrollments are electronic signatures or records under ECSA, then ECSA is not consistent with the provisions of E-Sign and

is preempted by E-Sign. Under E-Sign, the telephonic portion of the Petition must be dismissed. Alternatively, if TPV enrollments are not electronic signatures under ECSA, then no Act supports a TPV rulemaking for electricity customers and the telephonic portion of the Petition must be dismissed.

**iii. Even if the Commission finds that ECSA supercedes E-Sign, ECSA does not support a TPV-authorized LOA.**

In the event that the Commission finds both that ECSA is controlling law in Illinois and that an oral recording may be an electronic signature under Section 5-120(b) of ECSA, Section 5-115(b)(1) of ECSA still rejects the TPV process for a Section 2EE LOA. 5 ILCS 175/5-115(b)(1); 5 ILCS 175/5-120(b). Under Section 5-115(b)(1), ECSA will not apply where its application will “involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law, provided that the mere requirement that information be ‘in writing’, ‘written’, or ‘printed’ shall not by itself be sufficient to establish intent.” 5 ILCS 175/5-115(b)(1). The Staff argued that Section 2EE goes beyond the “mere requirement” of being in writing. Motion at 2-4. Rather, Section 2EE also requires that the LOA “be clearly legible, and must contain clear and unambiguous language” confirming the customer’s decision and the terms conditions and charges of the new supply contract. 815 ILCS 505/2EE(5). Further, the language must confirm “[t]hat the subscriber understand that any service provider selection the subscriber chooses may involve a charge to the subscriber for changing the subscriber’s current electric service provider.” 815 ILCS 505/2EE(5)(iv).

These requirements go beyond merely requiring that the LOA be in writing. The entirety of Section 2EE sets out not only what information must be included in the LOA, but also in what manner the information must appear. It must be “clearly legible,” and where combined with a check, it must be written in “easily readable, bold face type.” 815 ILCS 505/2EE(4&5). These requirements can be easily applied to an internet webpage, but can not be translated into a telemarketing script.

However, the distinction is greater than the incompatibility of TPV procedures and Section 2EE’s written requirements. Written agreements are traditionally viewed as bearing more weight and are accorded greater significance by courts and the parties than oral agreements. In a manner analogous to the Statute of Frauds, the requirements of the LOA help “to create a climate in which parties often regard their agreements as tentative until there is a signed writing.” Restatement of Contracts, Second. The General Assembly chose to encourage considered and careful customer decisions through the requirements of Section 2EE. *See also* Motion at 3-4. To dilute the LOA requirements of Section 2EE into a mere oral agreement, without explicit statutory direction, would be repugnant to the purpose of this statute and contrary to the General Assembly’s implicit intent.

**d. The Petition’s caselaw does not support TPV enrollment.**

The Staff’s motion challenged the two cases that Petition offered to support treating a TPV authorization as equivalent to a signature. Motion at 4-5; *see also* Petition at 6, *citing Just Pants v. Wagner*, 247 Ill. App. 3d 166, 173-174, 617 N.E.2d 246 (3<sup>rd</sup> Dist. 1993) and *In Re RealNetworks, Inc.*, Privacy Litigation 00-C-1366, 2000 U.S. Dist. LEXIS 6584, (N.D. Ill. May 11, 2000). The Petitioners selectively quoted from these case seemingly broad holdings regarding

what is a signature, when, in fact, these cases' holding are far more limited than the Petition's quotes imply. Motion at 5. Neither of these cases discusses TPV procedures or compares them to a signature or written contract. Motion at 4-5.

The *Just Pants* Court had to determine whether an arbitrator's typewritten name at the end of a memorandum of decision was sufficient to consider the award signed. *Just Pants*, 247 Ill. App. at 169. In pursuing its analysis, the Court cited various descriptions of what constitutes a signature and when a writing is considered to be signed. *Id.* at 173-174. The language quoted by the Petition was the Court's summation of this analysis, and is mere dicta to the *Just Pants* issue. Petition at 6, *citing id.* at 173-174.

The Court's actual reasoning considered several cases, which it cited to demonstrate that "an award need not be signed nor must it even be in writing to be validly executed. *Id.* at 174-176, *citing* 9 U.S.C. § 9 (1988); *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981); *Albin Stevedore Co. v. Central Rigging & Contracting Corp.*, 308 F.2d 347 (9<sup>th</sup> Cir. 1962); *Marshal v. Coach House Restaurant, Inc.*, 457 F. Supp. 946 (D.C.N.Y. 1978). It is based on this analysis and because the Court concluded that "[s]ince [the] defendant [did] not allege that the arbitration proceeding below was tainted by corruption or misconduct" that the *Just Pants* Court found that the arbitration award "signed" with only a typewritten name could be confirmed by the trial court. While in these cases, the authenticity of the memorandum as the arbitrator's official opinion was not in question, in the case of a TPV "signatures," the authenticity of a customer's intent to change electricity suppliers is a significant issue. Allowing a typewritten name on a court document to have the effect of a signature is not equivalent to allowing a TPV procedure to function as a signature for a document.

The *RealNetworks* Court only determined that an electronic writing, which appears on a video screen, expressed in letters or characters, may be considered written. *RealNetworks*, 2000 U.S. Dist. LEXIS 6584 at 7-8. The *RealNetworks* Court did not address any other permutations of electronic writing or any TPV procedures. Indeed, in making this finding the Court stated that “the Court does not now find that all electronic communications may be considered ‘written.’” Rather, the Court examines the contract at issue in this action and finds that its easily printable and storable nature is sufficient to render it ‘written.’” *Id.* at 8. Therefore, neither of the cases cited by the Petitioners support the Petitions’s proposed TPV enrollment rules.

**3. The TPV enrollment procedures allowed for gas customers do not support TPV enrollment for electricity customers.**

As addressed briefly above, the Petition relies on the enrollment methods of the gas choice pilot programs of Nicor Gas, People’s Gas and North Shore Gas, to support its proposed rules. Petition at 3. These orders are irrelevant to the statutory issue before the Commission. There is no federal or Illinois statute that uniformly allows a signature requirement to be met by a TPV process. Rather, in specific instances, customer authorizations that require a signature may also be verified by a TPV process. These instances include where a TPV process is explicitly provided for in the statute, i.e. enrollment of telephone customers, and where there is no statutory signature requirement, i.e. enrollment of natural gas customers.

The Public Utilities Act does not set out specific authorization requirements for the change of a natural gas customer’s supplier, and the Consumer Fraud Act does not even mention natural gas customers. Currently, there is no statutory LOA signature requirement for natural gas



customers.<sup>4</sup> Therefore, the Commission was unconstrained by any existing statutory signature requirement in setting out how natural gas customers could authorize a change in suppliers. That the Commission's orders ultimately required either an LOA or a TPV authorization does not alter the fact that there is no statutory signature requirement for changing a natural gas supplier. *See* Order in ICC Docket No. 00-0620/00-621, January 3, 2002; Order in Docket No. 01-0470, March 5, 2002.

In contradistinction, as addressed above, Illinois law does provide specific authorization requirements for changing an electricity customer's supplier. Therefore, the Commission should restrict its analysis of permissible enrollment methods to those specifically set out for electricity customers in Section 2EE of the Consumer Fraud Act.

However, if the Commission wishes to consider an analogous utility enrollment scheme, it should consider the enrollment rules of telephone customers over those of natural gas customers. Illinois law has specific authorization requirements for changing a telephone customer's carrier, while there are no current requirements for natural gas customers. Accordingly, it is the enrollment requirements for telephone customers, rather than natural gas customers, that the Commission should consider as analogous to the enrollment requirements for electricity customers.

**4. The telephone customers' enrollment requirements illustrate the limits of the electricity customers's enrollment requirements.**

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<sup>4</sup>The pending House Bill 4667, if passed, will impose general verification requirements for natural gas supplier changes in a form or manner approved by the Commission. HB 4667, 92<sup>nd</sup> General Assembly, 19-115(c).

In the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et. al.*), the General Assembly set out different authorization requirements for switching telephone providers verses electricity suppliers. For telephone customers, the Consumer Fraud Act adopts the Federal Communication Commission rules regarding authorization, which explicitly allow customer authorization via written or electronic documents or orally through a separate Third Party Verification (“TPV”) system. 815 ILCS 505/2DD; 47 CFR 64 Subpart K. Additionally, the Public Utilities Act sets out specific TPV requirements. 220 ILCS 5/13-902(e)(2). Finally, the Public Utilities Act directly authorizes the Commission to promulgate rules which comport with the Consumer Fraud Act and Federal Communications Commission rules. TPV requirements are specifically set out in two places, and the Commission is directly charged with promulgating rules that are in line with these requirements.

For electricity customers, on the other hand, the Consumer Fraud Act specifically sets out a more restrictive requirement in the form of a signed letter of authority (“LOA”) to authorize a change of suppliers. 815 ILCS 505/2EE. There is no mention of TPV enrollment procedures in Section 2EE of the Consumer Fraud Act. Nor does the Public Utilities Act provide TPV enrollment procedures for electricity customers. Although, Section 2DD, 15 ILCS 505/2DD, and Section 13-902 of the Public Utilities Act, 220 ILCS 5/13-902, allow either a written signature or a TPV enrollment for telephone customers, to impute authorization of TPV enrollment for electric customers into Section 2EE or Article XVI of the Public Utilities Act would violate basic rules of statutory construction.

Section 2EE limits how electricity customers can be enrolled. Under the legal maxim of *expressio unius exclusio alterius*, Section 2EE can not be interpreted to allow for other

enrollment methods without explicit statutory direction. *See Baker v. Miller*, 159 Ill.2d 249, 636 N.E.2d 551, 556 (1994) (“...the enumeration of one thing in a statute implies the exclusion of all others.”). Section 2EE of the Consumer Fraud Act requires a written signature. Section 2EE does not provide a TPV alternative. Section 2DD of the Consumer Fraud Act (815 ILCS 505/2DD) and Section 13-902 of the Public Utilities Act show that the General Assembly has approved TPV procedures for switching telephone providers. 220 ILCS 5/13-902(e)(2). The fact that the General Assembly allows TPV as part of an alternative enrollment method for telephone customers, demonstrates that the General Assembly will explicitly permit telephonic enrollment when it wishes. The fact that the General Assembly has not provided an explicit TPV exception to Section 2EE’s signature requirement demonstrates that the General Assembly has not yet chosen to extend that authorization to electricity customers.

There is no clear indication why the various utilities are treated differently under the Consumer Fraud Act. However, it is not for the Commission to reconcile these obvious differences. Rather, that task is reserved for the General Assembly. *See People v. Pullen*, 192 Ill.2d 36, 42, 733 N.E.2d 1235, 1238 (2000), *citing People v. Bole*, 155 Ill. 2d 188, 198, 613 N.E.2d 740, 745 (1993); *Toys “R” Us, Inc. v. Adelman*, 215 Ill. App. 3d 561, 568, 574 N.E.2d 1328, 1333 (3<sup>rd</sup> Dist. 1991) (“...regardless of the court’s opinion regarding the desirability of the results surrounding the operation of the statute, the court must construe the statute as it is and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.”).

Given the different statutory authorization requirements, the legislature's endorsement of TPV authorization for telephone and natural gas customers does not provide the Commission with the authority to permit TPV authorization for electricity customers. Indeed, the petition for rulemaking failed to cite any explicit statutory direction or authorization for the Illinois Commerce Commission to promulgate rules for telephonic enrollment for electric customers. Therefore, the telephonic enrollment portion of the Petition does not state a claim upon which relief can be granted, and the Staff's motion to dismiss that section should be granted.

**B. Internet enrollment.**

The Staff moved to dismiss the proposed internet rulemaking portion of the Petition in favor of a series of currently mandated workshops regarding the issue. Motion at 6. This approach would at best lead to an inefficient determination of state enrollment policy. At worst, this approach could lead to varying rules for each of the service territories, and the balkanization of competitive entry into the various service areas.

The Petitioner's proposed Internet rulemaking allows the Commission to adopt a uniform state-wide rule regarding internet enrollment. A uniform rule will allow incoming marketers to implement a single enrollment method for the entire state, rather than having to modify their approach for each service area. The individual tariff approach could result in unnecessary barriers to entry and would operate in contravention of the Commission's obligation to "promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." 220 ILCS 5/16-102(d).

While the currently mandated workshops will be useful in clarifying the issues, separate

company-specific tariffs are an inefficient way to resolve those issues. Tariffs represent the individual obligations and requirements of each utility. A state-wide obligation is better encompassed in a single rulemaking. The workshops can be easily absorbed into the rulemaking process, as has already occurred with the workshops ordered in this case. *Notice of Administrative Judge's Ruling*, Docket No. 02-0290, June 7, 2002. The Staff has not offered anything more than a preference for the workshops currently mandated in several dockets over the single proposed rulemaking. The statutory obligation to “promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers” impels a single rulemaking to apply equally to all electric suppliers 220 ILCS 5/16-102(d).

## **II. Conclusion**

For the above mentioned reasons, the People respectfully request the Illinois Commerce Commission to grant the telephonic enrollment section of the Commission Staff's Motion to Dismiss and deny the internet enrollment section of the Commission Staff's Motion to Dismiss.

Respectfully submitted,  
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Dated: June 19, 2002

By: \_\_\_\_\_  
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